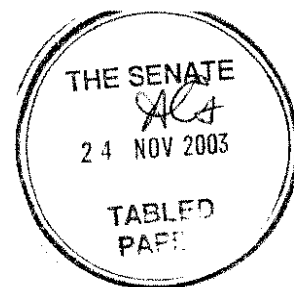




Australian Competition & Consumer Commission



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25 October 2003

Senator the Hon. Paul Calvert
President of the Senate
Parliament House
Canberra ACT 2600

Dear President

I refer to Senate Motions passed on 27 June 2002 and 12 November 2002 (the Motions) asking the Australian Competition and Consumer Commission (the Commission) to report to the Senate on various tobacco issues.

On 29 November 2002, the Commission wrote to you to advise that it was investigating two issues raised in the Motions ('mild' & 'light' and Clayton Utz/BAT) and that as a result, was not able to provide the Senate with further information about those investigations.

As these investigations are still continuing as at the date of this letter, the Commission is unable to provide any information in addition to its 29 November response, other than the information set out in the attached Schedule.

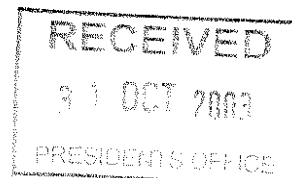
In relation to question (d) of the 27 June 2002 Motion, which relates to the Commission's liaison with stakeholders, the Commission is able to formally respond as set out in the attached Schedule.

The Commission has been in contact with officers at the Commonwealth Department of Health and Ageing who have advised that they will be responding to parts (f) and (g) of the June 2002 Motion separately.

Yours sincerely

Graeme Samuel
Chairman

EXECUTIVE OFFICE



Schedule of ACCC response to Senate Motion of 27 June 2002

Set out below are the relevant sections of the motion passed on 27 June 2002 and the Commission's activities in respect to each.

Notice of Motion question (c)(i) – 'mild' and 'light'

Question:

That the Senate—

[...]

(c) requires the ACCC to report, as soon as possible, on the following issues:

- (i) whether Australian tobacco companies have engaged in misleading or deceptive conduct in their use of the terms 'mild' and 'light';*

[...]

Response:

Before the Senate passed the September 2001 notice of motion asking the Commission to prepare its first report, the Commission had already begun its investigation into the use of terms such as 'mild' and 'light' by tobacco companies. An update on this investigation was provided in our April 2002 report to the Senate, following the first motion.

The Commission began its investigation in February 2001 after it received allegations that tobacco companies had misled consumers by implying that low tar cigarettes carry health advantages over other cigarettes. Specifically the allegation was that tobacco companies have engaged in misleading or deceptive conduct and made false representations by promoting their cigarette brands as 'light,' 'ultra-light,' 'mild,' 'ultra-mild' or 'low tar' on the basis of test results that indicate low tar readings. It was alleged that the testing methods are artificial, and do not provide an accurate reflection of an actual smoker's exposure to tar when smoking these cigarettes.

The Commission is investigating this matter in respect of the following sections of the *Trade Practices Act 1974*:

- s. 52, misleading or deceptive conduct;
- s. 53(a), false representations that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- s. 53(c), representations that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have; and
- s. 55, misleading conduct to which Industrial Property Convention applies.

The Commission's investigation is complex and has required consultation with Australian and overseas experts, primarily in the United States and United Kingdom. The complexity of this matter is evidenced by the fact there is no epidemiological evidence in Australia as to the health effects upon Australian smokers of low yield cigarettes compared to high yield

cigarettes, nor the smoking behaviour of Australian smokers of low and high yield cigarettes. The construction, design and ingredients of Australian cigarettes is not necessarily the same as that of cigarettes in the North American and European markets. This matter has involved the production of detailed information from the tobacco companies. This has necessitated the reviewing of numerous pages of documents and the thorough investigation and collection of evidence.

The Commission will soon be in a position to making a decision in respect of this investigation.

Notice of Motion question (c)(ii) – British American Tobacco and Clayton Utz

Question:

[...]

That the Senate--

(c) requires the ACCC to report, as soon as possible, on the following issues:

- (ii) whether there has been any misleading, deceptive or unconscionable conduct in breach of the Act by British American Tobacco and/or Clayton Utz with regard to document destruction for the purpose of withholding information relevant to possible litigation;*

[...]

Response:

Prior to the tabling of the Commission's April 2002 report to the Senate, the decision of Justice Eames of the Victorian Supreme Court in *McCabe v British American Tobacco Australia Services Limited* (BAT) was handed down.

This decision was appealed, and in December 2002 the Full Court of the Victorian Supreme Court overturned the original judge's decision. In doing so, the Full Court also disagreed with Eames J's findings attributing a sinister purpose to BAT in relation to its "document retention policy".

As you would be aware, the estate for Ms Rolah McCabe filed an application for special leave to appeal to the High Court. The Commission understands that on Friday 3 October 2003, the High Court refused the special leave application. The Commission will now consider what further action, if any, can be taken.

Notice of Motion question (d) – liaison with stakeholders

Question:

[...]

That the Senate--

(d) requests the ACCC to engage in consultation with interested parties and stakeholders over the perceived inadequacies in its response to the order of the Senate of 24 September 2001 and requires the ACCC to report on those consultations as soon as possible;

[...]

Response:

During the drafting of the Commission's response to the Senate's September 2001 motion, the Commission received submissions and other information and documents from interested parties.

At the time of preparing the first report, the Commission sought legal advice on some of the issues raised in these documents. A summary of the legal advice obtained was included in our April 2002 report.

The Commission is always happy to meet with interested parties in relation to any allegations they may have on any issues that fall within the provisions of the *Trade Practices Act*.

In respect of any possible inadequacies in the Commission's April 2002 report, we have liaised with representatives of several anti-tobacco lobby groups and have sought external legal advice on the issues that have been raised with us.

Commission staff sought external legal advice from Alan Robertson SC on these issues. This advice reviewed the internal legal advice that had been sought during the drafting of the April 2002 Senate response. Senior Counsel agreed with the internal legal advice in all respects except in relation to the issue of limitation periods.

With regard to limitation periods, Mr Robertson's advice stated that under section 82 a cause of action accrues when loss or damage is suffered as a result of the breach and not when a breach of the relevant provisions occurs and that the question of when the damage arises is a question of fact to be determined in all the circumstances.